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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY FLORES,

Defendant and Appellant.

G040302

(Super. Ct. No. 07CF1826)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Andy Flores of second degree robbery (Pen. Code, § 211; all statutory references are to this code unless noted) and active gang participation (§ 186.22, subd. (a)), and found an allegation he committed the robbery to benefit a criminal street gang (§ 186.22, subd. (b)) to be true. Defendant contends the trial court erred by failing to provide sua sponte a jury instruction clarifying the dual role of a police officer who testified as both a percipient witness and as a gang expert. For the reasons expressed below, we affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of May 25, 2007, codefendant Gerardo Simon<sup>1</sup> approached a man in the parking lot of a home improvement store in Orange and demanded his wallet. Fearing Simon might have a weapon, the victim placed his wallet on the car. Simon grabbed the wallet and attempted to take a flashlight the man had purchased. A struggle ensued, and Simon fled to the passenger side of a black Mitsubishi driven by defendant. Officers pursued the Mitsubishi to Santa Ana, where defendant pulled into a strip mall parking lot and stopped his car. Murrietta Police Officer Robert Skinner directed defendant and Simon to display their hands. Simon exited the car and fled. Defendant walked about 10 feet from his vehicle before obeying the officers' command to stop. Meanwhile, Simon discarded the victim's wallet as he scaled a block wall and eluded one of the pursuing officers. Another officer joined the pursuit and apprehended Simon at gunpoint.

After waiving his *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) rights, defendant told Officers Ted Taketa and John Mancini he spotted Simon walking down the street while driving to the mall to purchase a baptism gift for his niece. He offered Simon a ride. Simon told defendant he did not have any money and needed to

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<sup>1</sup> The trial court severed the cases. Simon's appeal is pending (G040601).

“come up,” which defendant understood to mean rob, steal or sell drugs to get money. Defendant pulled into the parking lot of the store and parked his car. Simon decamped, but returned and told defendant to leave. Simon showed him the stolen wallet and the money it contained as they left the scene. Defendant admitted the crime was “gang-related.” He also told the officers he had been affiliated with the Logan Street gang since he was a teenager, and Simon, age 17, was a younger gang member who looked up to defendant. During defendant’s pretrial incarceration, authorities intercepted an outgoing letter from defendant admitting he belonged to the Logan Street gang.

Mancini testified as a gang expert that in his opinion, Simon and defendant were active members of the same Santa Ana criminal street gang and the crime was committed in association with and for the benefit of the gang. Both Mancini and Takeda had heard the term “come up” used in the gang subculture and that it meant to commit a criminal act for the gang.

Following a jury trial in March 2007, the jury returned a guilty verdict and found the gang allegation to be true. Defendant admitted he had previously served three prior prison terms. (§ 667.5, subd. (b).) The court sentenced defendant to a 12-year prison term, imposing a two-year low term for robbery, a consecutive 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C)), and a concurrent term on the substantive gang count. The court dismissed the prior prison term enhancements in the interest of justice.

## II

### DISCUSSION

Defendant contends the trial court erred when it failed to sua sponte instruct the jury regarding Officer Mancini’s dual role as a percipient and expert witness. Defendant argues the court’s failure to separate and clarify Mancini’s lay testimony and expert opinion posed a substantial risk the jury accorded his lay observations unmerited

credibility based on his status as an expert, and gave undue weight to his expert opinion because it was based on personal knowledge beyond the evidence presented. We do not find the contention persuasive.

The trial court has a sua sponte duty to instruct “on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) The trial court’s obligation to provide sua sponte instructions varies from case to case, but includes instructions on the elements of all charged offenses, (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311), lesser included offenses (*People v. Breverman* (1998) 19 Cal.4th 142, 154), the prosecution’s burden of proof and the presumption of innocence (*People v. Vann* (1974) 12 Cal.3d 220, 225), and general principles relating to the evaluation of evidence, such as the credibility of witnesses, including experts (*People v. Daniels* (1991) 52 Cal.3d 815, 885).

The sua sponte obligation to instruct the jury on how to evaluate expert witness testimony stems from section 1127b.<sup>2</sup> Here, the trial court satisfied its sua sponte duty to instruct on expert witness testimony when it gave Judicial Council of California Criminal Jury Instructions CALCRIM No. 332, which incorporates the gist of section 1127b. The court instructed the jury: “A witness was allowed to testify as an expert and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to

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<sup>2</sup> Section 1127b provides: “When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows: [¶] Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given.”

decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence. [¶] An expert may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

The foregoing instruction correctly stated the applicable legal standard for evaluating expert witness testimony. The trial court had no obligation to modify the instruction because a court's sua sponte obligation does not extend to "specific points developed at the trial." (*People v. Hood* (1969) 1 Cal.3d 444, 449.) As our Supreme Court observed, "The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 535.) Consequently, "[a] defendant who believes that an instruction requires clarification must request it." (*People v. Coddington* (2000) 23 Cal.4th 529, 584, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Defendant's trial attorney did not object to the court's instruction on expert witness testimony, nor did counsel raise the issue defendant now asserts on appeal. Accordingly, the trial court had no duty to anticipate defendant's appellate argument and modify the standard expert witness instruction.

Moreover, we are satisfied the court's instructions adequately informed the jury about the difference between expert and lay witness testimony. Adherence to the instructions as a whole would not allow the jurors to believe Mancini's testimony as a

percipient witness merely because he testified as an expert. Here, the court instructed the jury it must base its decision on all the evidence presented at trial. (CALCRIM No. 200.) Evidence was defined as the sworn testimony of witnesses and any exhibits received into evidence (CALCRIM No. 222), and in a separate instruction the court informed the jury it alone must judge the credibility or believability of the witnesses (CALCRIM No. 226). In this instruction, the court provided several factors to consider in evaluating a witness's credibility, and after evaluating these factors jurors could decide to believe all or part of any witness's testimony, or reject it altogether. (*Ibid.*)

The trial court's instruction on how to evaluate an expert's opinion specifically directed the jurors to "follow the instructions about the believability of witnesses generally." (CALCRIM No. 332.) The instruction also directed jurors to determine whether any assumed fact in a hypothetical had been proved. We presume the jurors followed these instructions (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73), and therefore reject defendant's assertion the court's instructions posed a substantial risk jurors would not rigorously evaluate Officer Mancini's lay observations merely because he testified as an expert. (See *People v. Martin* (1983) 150 Cal.App.3d 148, 158 ["We assume jurors are intelligent persons capable of understanding and correlating jury instructions"].)

We also reject defendant's contention that the failure to clarify the instructions created a substantial risk that jurors would give Officer Mancini's expert opinion unwarranted weight because they would assume he "was privy to evidence not presented at trial." To embrace such a fanciful theory, we would have to adopt the unwarranted supposition that the jurors ignored the court's instructions to decide the case solely on the evidence presented at trial. No basis exists for this assumption. Indeed, the court carefully limited the jury's consideration of certain evidence. For example, Officer Mancini testified he considered Simon's pretrial statements in forming his opinion. The court directed the jurors to consider those statements only in evaluating Mancini's

opinion and not as proof the information contained in the statements was true. (CALCRIM No. 360.) The jurors therefore learned from these limiting instructions they must scrutinize certain evidence for limited purposes only. Thus, the court's detailed instructions provided a definition of evidence, admonished the jury to base their decision solely on the evidence, directed the jury to consider certain evidence for limited purposes only, and provided the jury with guidelines for evaluating the credibility of witnesses. It hardly follows from this that jurors would believe they could adopt Mancini's expert opinion based on facts not presented at trial.

Defendant's reliance on *United States v. Freeman* (9th Cir. 2007) 498 F.3d 893 (*Freeman*) is unavailing. There, a drug enforcement agent testified as both a lay witness and as an expert on the meaning of certain jargon known only to those with specialized knowledge of the drug trade. But the appellate court found the agent erroneously testified as an expert when he interpreted ambiguous statements not involving drug jargon, based only on his general knowledge of the investigation. (*Id.* at p. 902.) The court noted the difficulties that may arise when a witness testifies to lay observations and as an expert: the witness's aura of expertise may move the jury to grant the expert witness unmerited credibility when testifying about factual matters; a failed effort to impeach the witness as an expert may enhance the witness's credibility in testifying as a lay witness; an increased risk the expert will stray from reliable methodology and engage in sweeping conclusions, and the risk of juror confusion in discerning whether the expert is basing an opinion on reliable methodology or on personal knowledge of the case. (*Id.* at p. 903.)

The *Freeman* court found "the line between [the witness's] lay and expert testimony was never articulated for the jury. This lack of clarity regarding [the witness's] dual roles created a risk that there was an imprimatur of scientific or technical validity to the entirety of his testimony." (*Freeman, supra*, 498 F.3d at p. 903.) Yet the *Freeman*

court did not prohibit a witness from testifying in both capacities, and found a reduced risk of error if the jurors are aware of the witness's dual roles. (*Id.* at p. 904.)

Here, we are satisfied the trial court's instructions made it clear how to evaluate and distinguish Officer Mancini's testimony as a percipient witness and as an expert. As discussed above, the court's instructions guided the jury in evaluating the testimony of lay and expert witnesses. Defendant fails to demonstrate how the court's instructions were inadequate, nor does he propose language the court should have included in a limiting instruction.

Finally, unlike *Freeman*, this case does not involve the erroneous admission of evidence. Defendant did not object in the trial court, and does not argue here, that Mancini was unqualified to offer his opinions, or that his testimony on gangs in general, or defendant in particular, was objectionable. Nor does he assert the officer provided inadmissible lay or factual testimony. He does not suggest it was inappropriate for Mancini to rely on information gleaned from his investigation, including his interviews with defendant and Simon, in forming his opinions that defendant and Simon were actively participating in the gang and the robbery was gang related.



III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.